still living confined in an insane asylum. At his death several years afterwards, this second wife made a claim to one-third of his estate, to which of course, she had no legal right. The heirs then gave her this agreement: "In consideration of your abstaining from making and forbearing to make any claim against our late father's estate, we hereby undertake to pay you one-third of the net value of his estate up to the time of his death."

In an action on this agreement the only defence was a want of consideration, and that the plaintiff must have known that her marriage with her uncle was wholly void by st. 5 & 6 Will. 4, c. 54, even if she were ignorant of the fact that his first wife was alive, and therefore must be deemed to have known that she had no legal claim to the estate; but the jury found that when the agreement was made to forbear she believed she was widow of the deceased, and entitled to one-third of his estate. The court held the forbearance sufficient consideration, and upheld the contract, CHANNELL, B., saying: "We have considered this case with the care which the full arguments addressed to us deserved. We cannot distinguish it from *Callisher* v. *Bischoffsheim*, the latest authority on the subject, and we feel bound by that decision."

Thus it appears we are warranted in believing that upon the principle of the thing, and upon the more recent authorities, *a forbearance to sue a bonâ fide claim, as well as a compromise of a pending suit, is a good consideration for a promise to pay, although in fact or in law the promisee would not have recovered upon his original claim.*

EDMUND H. BENNETT.

Court of Common Pleas, No. 3, of Philadelphia.

LOWRY ET AL. *v.* PLITT ET AL.

After the proper interment of a body the control over it rests with the next of kin who is living. It cannot be transmitted or transferred.

Where there were several next of kin in the same degree and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed.

When a body has been properly buried in a vault, with the consent of all concerned; *quaere* whether even the next of kin can remove it against the will of the vault-owner though the latter be a stranger.

THIS was a motion for an injunction heard on bill and answer. The complainants were the three sons of Henrietta Lowry, and the two executors of a deceased son, Lowry Donaldson Lowry; the respondents were Sophia W. Plitt, Elizabeth S. Edwards, and the Laurel Hill Cemetery Company. The bill set forth that Mrs. Henrietta Lowry died January 12th 1866, at a house in Philadelphia, which had been purchased and furnished for her by her son, Lowry Donaldson Lowry, who was then residing at Lima, Peru; that at the time of the decease of Mrs. Lowry neither she nor any of her children had any place of family sepulture, and her

remains were interred, without objection from any of her children present at her death, in a lot in Laurel Hill Cemetery belonging to her sister, Sophia W. Plitt; that, in 1869, Lowry D. Lowry returned to Philadelphia, and died there in 1871, leaving a will, wherein he bequeathed $5000, to be appropriated to building a vault in Laurel Hill Cemetery, in which he directed to be placed the remains of his mother, and of any of his brothers and sisters who had died, or might thereafter die—also his own remains and those of his immediate family; that the vault had been completed, but that respondents refused permission to the executors of Lowry D. Lowry to enter Mrs. Plitt's lot for the purpose of removing Mrs. Lowry's remains to her son's vault. The bill prayed an injunction, forbidding respondents from hindering the removal. The answer of Mrs. Plitt and Elizabeth S. Edwards admitted the main facts set forth in the bill, but averred that Mrs. Lowry left a daughter surviving, viz., the respondent, Elizabeth S. Edwards; that the father, mother, four sisters, and a son of Henrietta Lowry were, previous to and at the time of her death, buried in the lot at Laurel Hill belonging to Mrs. Plitt, and which the latter had purchased with the concurrence of Mrs. Lowry for a family burial lot; that Mrs. Lowry, before her death, repeatedly expressed a desire to be buried in that lot, and on her death-bed gave express directions to that effect. Respondents denied the right of complainants to remove the remains, and declared that such removal would do great violence to their feelings.

Before the argument one of the three sons of Mrs. Lowry, complainants in this bill, died, and another one withdrew from the cause and opposed the removal.

Findlay and *Thomas*, for complainants.

Edward Shippen, for respondents.

The opinion of the court was delivered by

FINLETTER, J.—The controversy is about the right to disinter and remove, after appropriate obsequies, which were considered by all interested as final.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, it is clearly and broadly decided that, after interment, all control over the remains is with the next of kin. The reasoning which transfers this right from the widow is not satisfactory, because it does not seem to be

based upon principle or reason; and is repugnant to the best feelings of our nature.

Such a right must necessarily be in the next of living kin. It is only the living who can give the protection, or be burdened with the duty of protection from which the right springs. It is only the living whose feelings can be outraged by any unlawful disturbance of the dead. From this it follows that it is a right which cannot be transmitted or transferred. It is, moreover, one in which all of the next of kin have an equal interest. The plaintiff, therefore, derives no authority over the remains of his mother from his brother's will; and in himself he has no better claim than his sister or brother. He is then without that clear, exclusive title, which alone is enforced by injunction.

When it is considered that the removal of the remains of Mrs. Lowry, involves an invasion of the rights of Mrs. Plitt, it is not clear that, even if all the next of kin had joined in these proceedings, we could have granted the relief prayed for. The law regards with favor "the repose of the dead." When they are inurned in the places selected by them, it must be something more than sentiment or abstract right which will induce us to enforce the claim of the next of kin, by the invasion of the burial-place of another. In such a case it may well be questioned whether the right of the next of kin exists at all.

This doctrine is more than foreshadowed by Chief Justice READ, in *Wynkoop* v. *Wynkoop*, when he says: "Besides, the fact that her son is deposited in her burial-place, in consecrated ground, and that he was buried with the ceremonies of the church, and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances."

Mrs. Lowry was buried where she desired to be; with the acquiescence of all her children. Those of them who survive are divided upon the question of removal. She is with her father, mother, sisters, and her first born. Upon the granite which marks their resting place her name is graven with theirs; and beneath it their ashes have commingled. It is fitting they should remain undisturbed. The bill is dismissed.

We present this case to our readers, although not a decision of a court of last resort, as one of a class of cases not often met with in the reports. As said by Mr. Justice READ, in regard to cases of this kind, "it is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision."

It is not necessary to trace the growth

of ecclesiastical jurisdiction in these matters in England, as the rules of law there have never been adopted in this country, and possess but little more than an historical interest for us. BLACKSTONE shows clearly the state of the law in his day when the ecclesiastical jurisdiction in these matters had become fully settled. He says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried. The person, indeed, who has the freehold of the soil may bring an action against such as dig and disturb it * * *:" 2 Black. Com. 429. COKE says: "The burial of the *cadaver* is *nullius in bonis* and belongs to ecclesiastical cognisance; but as to the monument, action is given at the common law for the defacing thereof:" 3 Inst. 203.

These principles were enforced by the King's Bench in the case of *King* v. *Coleridge*, 2 B. & Ald. 806; 3 Phill. 337, n.; which arose upon proceedings begun by one Gilbert for a *mandamus* to compel the churchwardens of the parish in which he lived to permit him to bury his wife in the parish graveyard in an *iron* coffin. The *mandamus* was refused, the court saying that the *right* of sepulture was a common-law right, but the *mode of burial* was of ecclesiastical cognisance alone. The case was then carried into the Consistory Court, before Sir WILLIAM SCOTT, upon articles against the churchwardens for their refusal to permit the burial as demanded by Gilbert. The reasons urged by the wardens for their refusal were that the parish was a large one and had but three small burying-grounds, and if a coffin of imperishable material was used the grounds would soon become useless and it would be impossible for all the parishioners to find room for burial.

On behalf of Gilbert it was argued that ground once given to the interment of a body is appropriated for ever, and the insertion of any other body into that space at any time, however distant, is an unwarrantable intrusion. The judgment of the court was that the use of an iron coffin was not unlawful, but that it could only be allowed upon payment of a larger burial-fee. The court in reply to this latter argument said: "The legal doctrine certainly is that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed, but is likewise the common property of the living and of generations yet unborn, and subject only to temporary appropriation. * * * Even a brick grave without the authority of the ecclesiastical magistrate is an aggression upon the common freehold interest, and carries the pretentions of the dead to an extent that violates the first rights of the living:" *Gilbert* v. *Buzzard*, 3 Phill. 335.

In *Reg.* v. *Twiss*, 10 B. & S. 298, it was held that ground consecrated for burial purposes cannot be applied to secular purposes, nor the bodies of the dead buried in it removed by the owners of the soil without the authority of an Act of Parliament.

In *Reg.* v. *Sharpe*, 7 Cox C. C. 214, where a son, from motives of filial affection and religious duty, removed the corpse of his mother from a family burial-place in a desecrated burial-ground, for the purpose of interring it with that of his family in a consecrated church-ground, it was held that the act constituted an indictable misdemeanor. ERLE, J., said, in delivering the opinion of the court: "Our law does not recognise the right of any one child to the corpse of its parent, as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends on

this form of indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the ground where it had been laid." s. c. Dears. & B. 160.

Two controversial books on the subject of burials have lately appeared in England; one "The Burial Question," by Charles J. Burton, Chancellor of the Diocese of Carlisle; and the other, "On the Law relating to Burials," published anonymously.

The earliest case that we have found in America is a curious controversy which arose in Pennsylvania over the remains of Stephen Girard, a number of years after his death: *In re Stephen Girard*, 4 Am. L. J. 97; 5 Pa. L. J. Rep. 68. Girard directed in his will that his body should be buried in the ground of the Holy Trinity Catholic Church; this was done. The councils of the city of Philadelphia, which was the residuary legatee under his will, removed his remains from their first resting-place, by permission of the board of health and of the authorities of the church, and left them temporarily in the charge of an undertaker, in order to a subsequent removal to a sarcophagus built for them at Girard College, where, it appeared, they were to be buried with Masonic ceremonies. A bill was filed by some of Girard's relatives, praying for a special injunction to restrain this action and an order on the city authorities to restore the remains to their former resting-place. Judge KING, in deciding the motion, said: "Where a person was buried in a common burying-ground, where the title did not pass, the law did not furnish a remedy in reference to a removal; but a chancellor would intervene to prevent the desecration of the grave. If I had been applied to before the removal of the body, I would have interfered. But this is not the case here. The city claims as the residuary legatee and her motive was to indicate respect and honor for the memory of the man. If the executors chose to disclaim it they might have done so, if they were executors, but if they disclaimed, the relatives might be parties alone. In all these aspects a court of equity might interfere. But the body has been removed and the relatives had a knowledge of it. Even here the court can interfere; but ordering the body back to its former place would be deciding the case; we are not asked to do this now. It would be deciding the case before a hearing."

The court then ordered that the body be placed in the sarcophagus at Girard College, as the most convenient temporary abode, until its final resting-place should be determined at the final hearing.

In this case the English doctrine, as set forth by BLACKSTONE, was cited by eminent counsel as the law in Pennsylvania; but, as it appears above, the court did not find it necessary to decide the point. A case arising soon after this in New York received very full consideration at the hands of Samuel B. Ruggles, in a report to the Supreme Court, as referee "in the matter of widening Beekman street," in the city of New York. In that case it appeared that the commissioners of estimate, &c., had paid into court the sum of $28,000, as damages for certain land taken in widening that street. The land taken belonged to the Brick Presbyterian Church, and contained "vaults for the burial of the dead in which various individuals claimed rights of interment, and the use thereof for the funeral of the dead." One Sherwood had been interred in this lot in 1801 and his remains had rested there quietly ever since. His descendants claimed that the expense of re-interring them in such suitable place as they might select, and of erecting the monument that had always stood over them, should be paid out of this fund. It did not appear that any burial-fee had ever been paid to

the church for permitting the body to be buried there. The referee was of opinion that the use of this cemetery was a charitable as well as a religious use, a trust which a court of equity in the exercise of its undisputed equity powers might duly control and regulate ; * * * that it was proper to retain from the fund a sum sufficient to cover the expense of re-interring the remains of Moses Sherwood in a separate ground in such reasonable locality " as his descendants might select." In his report, the referee drew " the following conclusions, as justly deducible from the fact that no ecclesiastical element exists in the jurisprudence" of New York.

" 1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognisance, nor to sacerdotal power of any kind.

" 2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognise and protect.

" 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

" 4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

" 5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains."

The Supreme Court, at a special Term in 1856, confirmed this report in all respects and decreed accordingly ; and also directed the church to re-inter separately the remains found in any other of the graves whenever identified by the next of kin. See 4 Bradf. (Appendix) 502.

This case contains a very full exposition of the law of burial, and has been cited with approbation by the courts of other states.

In *Wynkoop* v. *Wynkoop*, 6 Wright 293, the case was this : Col. Wynkoop died in 1857, and was buried with military honors at Pottsville, in a lot belonging to his mother. Within a year his widow, who was also his administratrix, endeavored to remove his remains, but was refused permission by the owners of the cemetery and by her husband's next of kin. She thereupon filed a bill for an injunction restraining the defendants (the owners of the cemetery, the owner of the lot and her husband's next of kin) from interfering with the removal. The court, in dismissing the bill, *held*, that as administratrix the complainant's duty to bury terminated with the burial, and that as widow, " she would appear in that case to have no rights after the interment." The court further said, " that the fact that the body was deposited in his mother's burial-place in consecrated ground, and that he was buried with the ceremonies of the church and the honors of war, was sufficient to justify a court of equity in refusing permission to a removal under the circumstances." This decision cannot be extended beyond the particular state of facts upon which it was based. It appears that the lot was owned by the mother of the deceased, and that he had been buried there by his wife's consent. The court, therefore, only decided that a widow who consented to her husband's burial in a certain place, could not, against the wishes of his family, be allowed to remove his remains. It appears to leave undecided the question as to what voice a surviving husband or wife has in deciding where the deceased wife's or husband's remains shall be interred in the first place.

It has been decided that a husband has control over the remains of his wife : See the Ohio case, *infra*. It is reasonable that a widow, administering to her husband's estate, should, as against his heirs, choose his final resting-place, though this has never been

decided. If she waives her right to administer, it would appear from the cases that the remains are under the control of the next of kin: See 4 Bradf. 503, *supra*. The reason given for depriving the widow of what would seem to be a natural right does not seem altogether satisfactory: it is that a widow may marry again and the custody of her husband's remains may thus pass into the hands of strangers. But in most cases burial-lots descend as real estate, and would commonly remain in the family of the husband, if originally his property. Arguments drawn from the civil law or even the English law would not avail in America, as the perpetuation of families, in the male branches, had in the early Roman system and has always had in England an importance which it does not possess in this country, and an essential part of this idea lay in the preservation in the line of the family of the tombs and monuments of the dead and of all the heirlooms and relics of the race.

It has been said that the expressed wishes of a testator as to the disposition of his remains will prevail over the wishes of his family: 4 Bradf. 503, *supra*.

Bogert v. *Indianapolis*, 13 Ind. 138, was an action by Indianapolis against Bogert charging him with violation of a "cemetery ordinance." The court (per PERKINS, J.) said *arguendo*: "We lay down the proposition, that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. Hence a by-law might be reasonable where population was dense, requiring those buried to be sunk to a certain depth, or to be buried outside of where population was or was likely to become dense, and within a reasonable time after death, &c.; but we doubt if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives thereof, they being able and willing to bury the same."

A remarkable case that arose in Cleveland, Ohio, is reported (not very carefully) in Am. Law Times, July 1871. The body of the plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting its throat, in order, in the interest of science, to discover the cause of death. The defendants promised to perform the operation in the presence of the friends of the deceased, and to give the body a decent burial. By statements of the dangers of infection the defendants deterred the friends from attempting to see the remains at the medical college and held a pretended funeral on the day before the time appointed. It appeared afterwards that they had retained the body for general dissection and performed the funeral ceremonies over a coffin filled with rubbish. Upon a discovery of this fraud and upon threats of criminal prosecution the defendants sent the body in a rough box to the relatives of the deceased. The husband, who had been absent from home, upon his return brought suit for damages for laceration of feelings, expense of recovering the body, &c., and for the fraud. PRENTISS, J., in overruling a demurrer filed by defendants, said: "A corpse is not in itself so far property that it could be made an article of merchandise. A court would not enforce a contract for the sale of a dead human body. The same reasons which forbid the enforcing of such a contract, require that somebody shall have the right to the care and custody of a body for the purpose of securing it a decent burial. For this purpose the law gives a husband the custody of the dead body of his

wife, a parent of a child and a child of a parent. The remedy (for infringing this right of custody) must be by civil action. * * * A body itself may not be property; but this right may be called perhaps a *quasi* property. At any rate it is a right which the law will enforce, and for an infringement of which an action will lie."

Pierce and Wife v. *Proprietors of Swan Point Cemetery and Almira T. Metcalf*, 10 R. I. 227, was the reverse of *Wynkoop* v. *Wynkoop, supra*. There the deceased, Metcalf, had died in 1856 and been buried in his own lot in Swan Point Cemetery, with the consent of his widow and in accordance with his own wishes. At his death this lot became the property of his only child, Mrs. Pierce. In 1869, against the consent of this daughter, and in violation of the by-laws of the defendant corporation, his remains were removed by his widow, and placed in another lot in the same cemetery. His daughter filed a bill in equity to compel the restoration of the remains to their first resting-place. The widow demurred to the bill for want of equity. The other defendant submitted to such order as the court might make in the case. The court, in overruling the demurrer, was of opinion that the remains should be restored to the place from which they had been taken. The view taken was that the person having charge of a body (in this case the corporation defendant) holds it as a sacred trust for the benefit of all who have an interest in it from family or friendship and that a court of equity will regulate this trust and change the custody if improperly managed. In this view, it was said, that it was not necessary to decide what might have been done had the child assented, or what the child might do of herself; and further that, although a body is not property, it may be considered a sort of *quasi* property to which certain persons may have rights, as they have duties, towards it arising out of common humanity. This case contains a very full discussion of the question.

The latest case we have found, except the principal case, is *Secor's Case*, 31 Leg. Int. 268. There it appeared that the widow of the deceased had decently interred her husband's remains, when his son, who averred that he had purchased a lot of ground pursuant to the instructions of his father (for a family burying-ground), insisted upon that being the proper place of interment. The Supreme Court for King's county, New York, upon motion of the widow, granted a perpetual injunction to restrain the son from removing the remains of his father. PRATT, J., in delivering judgment, said: "A proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency." This ruling was sustained on appeal.

Supreme Court of the United States.

HOME INS. CO OF NEW YORK *v.* BALTIMORE WAREHOUSE CO.

A policy of insurance taken out by warehouse-keepers, against loss or damage by fire on "merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in" a designated warehouse, covers the merchandise itself, and not merely the interest or claim of the warehouse-keepers.

If the merchandise be destroyed by fire, the assured may recover the entire value